NO. 20201

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION,
LOCALS 770, 137, 905 and 1222,

APPELLANTS,

And

RALPH E. KENNEDY, REGIONAL DIRECTOR
OF THE 21ST REGION OF THE
NATIONAL LABOR RELATIONS BOARD, ETC.,

APPELLANT,

VS.

FOOD EMPLOYERS COUNCIL, INC.,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BRIEF FOR AMICUS CURIAE JOINT COUNCIL OF TEAMSTERS NO. 42

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No. 42

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JURISDICTIONAL STATEMENT

This is an appeal by the petitioner below (the Regional Director of the Twenty-First Region of the National Labor Relations Board) [Transcript of Record (T.R.) 221], as well as the union respondents [T.R. 222, 224], from

an order granting a temporary injunction [T.R. 201].

Amicus Curiae Joint Council of Teamsters No. 42 was granted permission to appear by order of this Court dated July 2, 1965, as corrected on July 14, 1965.

STATEMENT OF THE CASE

The appellants each contend that the District Court erred in granting an injunction order. In order to properly understand the District Court's ruling, it is necessary to refer to facts and evidence before the Court, some of which has not been set forth in the briefs of the parties.

1. The Petition for Injunction- On January 8, 1965, the Regional Director filed a petition for an injunction [T.R. 2] against a number of Retail Clerks unions (Clerks), the Food Employers Council, Inc. (Employers) and a large number of individual food markets who are members of the Employers. This suit was filed pursuant to section 10(1) of the Labor-Management Relations Act (Act) [69 Stat. 149, 29 U.S.C. §160(1)]. In his sworn petition, the Regional Director made the following allegations which were either admitted by the respondent Clerks and the Employers, or were found by the Court to be true:

a. Charges of unfair labor practices under section 8(e) of the Act were filed with the Board against the Clerks and the Employers on May 7, 1964, by a group of

employers and a labor organization [T.R. 3-4, 3(a) and (b); T.R. 206, ¶¶2(a) and (b)] (collectively called the Charging Parties).

b. On the basis of the unfair labor practice charges an investigation was conducted by the Regional Director,[1/] and the results of the investigation provided him with reasonable cause to believe that certain provisions of Article I of the collective bargaining agreement between the Clerks and the Employers violated section 8(e) of the Act [T.R. 13-14, ¶5(j); T.R. 11-12, ¶4(j)].

c. In the belief that unless enjoined the Clerks and the Employers would continue to give effect to those provisions of Article I which allegedly violate section 8(e), on June 30, 1964, the Regional Director filed a petition for injunction under section 10(l), entitled Harrington v. Retail Clerks, Civil No. 64-874-PH. On the same date, a stipulation to refrain from unfair labor

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1/ Although it is not alleged that an investigation was conducted, section 10(l) of the Act directs that such an investigation take place before the Regional Director may make an application for injunctive relief, and the presumption is that a government official will perform the duties required of him. See United States v. Washington, 233 F.2d 811, 816 (9th Cir. 1956) (presumption that official duty is regularly performed).

practices was entered into by the Clerks, the Employers and the Regional Director, and the petition for injunction was accordingly taken off calendar [T.R. 15, ¶6] and subsequently dismissed by the Regional Director [T.R. 15-16, ¶7].

d. Notwithstanding the undertakings contained in the stipulation to refrain from unfair labor practices, the Clerks filed a suit against a member of the Employers on November 10, 1964, alleging certain grievances, "and demanded implementation and arbitration of portions of Article I of the Clerks' Agreement . . . as to which injunctive relief was sought by the Board . . . in Civil No. 64-874-PH" [T.R. 16, ¶8; T.R. 216, ¶4(l)].

e. By the act of requesting arbitration of the grievances set forth as an exhibit to their suit to compel arbitration, the Clerks entered into, invoked and gave effect to a contract which violated section 8(e) of the Act [T.R. 16-17, ¶9; T.R. 216-17, ¶4(m)].

f. Finally, in his prayer for relief the Regional Director asked for the following things:

(i) An injunction against the Clerks and the Employers to prevent them from "maintaining, giving effect to, demanding arbitration of, submitting to arbitration, or enforcing Article I, Sections A, B and F(1) and (2)" of the Clerks' agreement, insofar as those sections require the Employers to do or not to do certain things in violation of section 8(e) [T.R. 17

¶1(a)]; and

(ii) "[S]uch further and other relief as may be just and proper" [T.R. 19, ¶3].

2. The May 10, 1965 Hearing- Between the time of the filing by the Regional Director of the second petition for an injunction on January 8, 1965, and the date of May 10, 1965, the petition lay quiescent. This was primarily because the state court suit that had been initiated by the Clerks in which they sought an order directing arbitration, had been voluntarily dismissed [see Reporter's Transcript of Proceedings of May 10, 1965 (hereinafter referred to as "May 10 Trans.") at 31, lines 2-8].

Subsequent to the dismissal of the state court action, the Regional Director entered into another stipulation with the Clerks [T.R. 160] whereby the Clerks would be permitted to arbitrate any issue they wished under the clauses that were being attacked before the Board, so long as prior to putting an arbitral award into effect, the Clerks first submitted it to the Regional Director for approval [T.R. 160, 162, ¶1(b)].

A hearing was held before the District Court on May 10, 1965, at which the Regional Director[2/] urged the Court to approve the stipulation [T.R. 163, lines 25-28] and

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2/ Acting through his attorney in all of the proceedings.

take the injunction proceeding off calendar [T.R. 162, ¶3]. The Charging Parties appeared at this hearing, argued both orally and through written briefs, and submitted evidence [Exhibit 2; May 10 Trans. at 16, lines 4-10].

a. The Clerks' Newspaper- Included in the evidence presented by the Charging Parties was a union newspaper [Ex. 2] put out by the Clerks.[3/] In a lead article by Joseph T. DeSilva, the head of one of the Clerks' unions, DeSilva stated that on March 3, 1965, his Union's by-laws were amended to provide "double dues for a six-month period in order to build a war chest. This was done so that we would stand ready to do battle in the event the employers persisted in their refusal to arbitrate" [Ex. 2, p. 1, col. 1]. The article then continued, "and as for the 'threatened strike,' let us hasten to point out that it definitely was not a threat--that it very nearly became a reality and is still a possibility. We are not bluffing" [id., col. 2 (emphasis in original)].

The object of the strike threat, as set forth in the DeSilva article, was this: "Any strategy the Union has employed in this latest dispute has been geared toward making the food employers live up to their word" [ibid.].

3/ The newspaper stands as an admission against interest. State Farm Mut. Ins. Co. v. Porter, 186 F.2d 834, 843 (9th Cir. 1950) (admission is equivalent to affirmative testimony

"[A]rbitration," continues the article, "would not be necessary if the employers would only live up to their word" [id., p. 2, col. 3]. Finally, the article by DeSilva sets forth what the Clerks mean when they say that arbitration would not be necessary if the employers would live up to their word:

> "[T]he leadership and membership of the Union have lived up to their word.
>
> "But this cannot be said about the employers in general.
>
> "The most glaring example of this is the employers' failure to deliver wall-to-wall, floor-to-ceiling work to the clerks . . ." [id., p. 3, col. 2 (emphasis in original)].

The phrase "wall-to-wall, floor-to-ceiling work," has reference to certain provisions in Article I of the Clerks' agreement with the Employers in which the Clerks purport to be recognized as the bargaining representative of "all employees, licensees, lessees, and concessionaires . . . except as limited below, who perform work within food markets . . ." [T.R. 4, lines 25-32].

b. Admissions by Counsel- In addition to this documentary evidence, counsel for one group of Clerks' unions acknowledged that the Employers' acquiescence to arbitration was secured through threats of work stoppages [May 10 Trans. at 40, lines 1-8; id., at 42, lines 20-24].

c. Basis of Petition- At the conclusion of the hearing on May 10, the Regional Director acknowledged to the Court that the act of arbitrating under a contract deemed to be illegal under section 8(e) of the Act, is itself illegal conduct under that section:

> "Your Honor, the second proceeding here [i.e., the petition filed on January 8, 1965] was instituted on the basis of arbitrating a portion of this contract under attack or the filing of a suit to compel arbitration in the State court, and it was felt that this conduct gave effect to the illegal provision tantamount to reentering the 'hot cargo' clause and for this reason the proceeding was reinstated" [May 10 Trans. at 48, lines 10-16 (emphasis added)].

The Regional Director informed the Court that "the thrust of the case" filed by him was directed against the alleged illegal clause as well as against "giving it [the clause] effect, by seeking to compel arbitration of it" [May 10 Trans. at 48, line 23, to p. 49, line 1]; however, between the time the suit was filed and the time of the May 10 hearing, the Clerks "had convinced the Board that . . . they ought to have the right to arbitrate but without the right to confirm or enforce [an award] until it is passed

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upon by the Board" [May 10 Trans at 11, lines 9-13].[4/]

The District Court thereafter took under submission the question of whether it should approve the stipulation [May 10 Trans. at 50, lines 19-21].

3. Memorandum Opinion of May 27- On May 27, 1965, the District Court issued a memorandum opinion on the issue of whether it would approve the stipulation proposed by the Regional Director and the Clerks [T.R. 168].

The Court declined to accept the stipulation on the ground that,

> "if approved, [it] would in effect, place this court's imprimitur on continuance of the arbitration proceeding demanded by the Clerks' Unions. The effort at arbitration is alleged in the Petition to be a violation of the Act, and is specifically asked to be enjoined by Paragraph 1(a) of the prayer of the complaint in this court" [T.R. 168, lines 17-23].

The District Court pointed out that at the

4/ The Regional Director's subsequent remark that the Clerks did not seek to arbitrate illegal portions of the contract [May 10 Trans. at 49, lines 1-3], appears to be a misstatement since throughout the hearing it was admittedly the illegal portions of the contract which the Clerks sought to arbitrate, and it was at such an arbitration that the injunction order was directed.

hearing on May 10, the Charging Parties had objected to the stipulation and had presented evidence in documentary form [id., lines 28-31]; and relying in its Memorandum Opinion upon McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964), a case which had been cited to the Court by the Regional Director in support of his application for an injunction [T.R. 101-03], the Court ordered a hearing on June 14, 1965 on whether or not an injunction should issue [T.R. 169].

4. The Hearing on June 14, 1965- Prior to the June 14 hearing, the Regional Director noticed a motion for reconsideration of the Court's decision denying approval of the stipulation [T.R. 170-73]. This motion was heard concurrently with the hearing on what relief, if any, should be granted pursuant to the Regional Director's petition for an injunction. And at the same hearing, the Regional Director moved the Court to certify the matter, pursuant to 28 U.S.C. §1292(b) [sic.], to the Court of Appeals [June 14 Trans. at 6, line 24, to p. 7, line 2], to which the District Court replied:

> "Counsel, I do not believe that I can conscientiously make such a certification in view of the allegations in your complaint" [June 14 Trans. at 7, lines 9-11].

The Regional Director then acknowledged that "it is true that the complaint and the petition does pray

for relief against the proceeding to arbitration" [id., lines 23-25], following which the Court and the Regional Director had this colloquy:

> "THE COURT: It not only prays for that but it alleges that that is one of the things which violated the Act. In fact, as far as I can see, that is one of the principal reasons for your coming into this court.
>
> "MR. PRICE [the attorney for the Regional Director]: That is true, your Honor" [June 14 Trans. at 8, lines 1-5 (emphasis added)].

The Regional Director then explained that injunctive relief was not being requested at that time because the Clerks had assured him that they would not give effect to any arbitral award until the Regional Director had approved it [id., lines 5-20].

Among the items of additional evidence that were presented to the Court at this hearing was a letter dated March 19, 1965, from DeSilva of Local 770 of the Clerks, to Robert K. Fox of the Employers, setting forth seven items which the Clerks wished to have arbitrated [T.R. 188]. Among the items sought to be arbitrated by the Clerks was item 2: "whether there has been a failure of consideration, nullifying the March 14, 1964 Memorandum Agreement" (i.e., the contract between the Clerks and the Employers which contains the attacked clauses); item 3

involved the issue of whether the Employers were "unjustly enriched" as a result of the parties' inability to put the attacked clauses into effect, and as a result of the Clerks having given the Employers lower rates and broader box-boy duties in return for the attacked clause; item 5 involved the issue of whether the Employer had in good faith complied with its contractual commitment to aid in the defense of the attacked clauses; and the last item involved the question of whether the Clerks could strike in return for their inability to put the attacked clauses into effect.

The Court's attention was then directed to a juxtaposition of the seven items presently sought to be arbitrated with the items which the Clerks had sought to arbitrate earlier, and which had been the basis of the Regional Director's present request for an injunction [June 14 Trans. at 13, line 8 to p. 14, line 7]. (The earlier issues had been set forth in a letter attached as an exhibit to the Clerks' state court suit to compel arbitration; and this suit, as well as the letter exhibit, were in turn appended as exhibits to the Regional Director's petition for an injunction [T.R. 50, 56]. In the Clerks' earlier request for arbitration, their contention was as follows:

> "[T]he Union contends that if Article I in its entirety is unenforceable, then the contract falls . . . .
>
> ". . . .

"The Union also contends that if any part of the contract falls, then the Union is free to take economic action" [T.R. 57 (emphasis in original)].)

The Court asked if there was any further evidence to be presented [June 14 Trans. at 50, lines 12-13], and hearing no response the Court granted an injunction [id., lines 14-20].

5. The Objections to the Proposed Order- Findings of fact and conclusions of law were then drawn, which recited that by, among other things, having filed the state court lawsuit [T.R. 216, lines 18-25], the Clerks "entered into, invoked and gave effect to a contract or agreement" violative of section 8(e) [id., lines 26-31]. The proposed order was broadly drawn so as to enjoin any arbitration arising out of Article I of the Clerks' agreement with the Employers, and in particular the seven items set forth in the March 19, 1965 letter [T.R. 204, lines 1-6]. This broad order was drawn by the Board and approved as to form by the Clerks [id., lines 12-26].

The sole objectors to the proposed order were the Charging Parties [T.R. 195], and the sole objection made to the order was that it was

"too broad and inclusive, in that it would prevent arbitration between the Clerks' Local Unions and the food markets with respect, not only to the contract clauses in dispute before the . . . Board, but

also clauses which are not disputed . . . ."

[T.R. 195, lines 26-30].

In response to the objections of the Charging Parties, the Court's order nunc pro tunc was issued [T.R. 199], which limited the injunction to those clauses "which are in dispute before the . . . Board."

ARGUMENT

I.

THE DISTRICT COURT HAD THE POWER TO ISSUE AN INJUNCTION UNDER SECTION 10(1) ONCE A PETITION WAS FILED BY THE REGIONAL DIRECTOR.

A. The Statutory Scheme.

Prior to 1947, there were no exceptions to the Norris-LaGuardia Act's [47 Stat. 70 (1932), 29 U.S.C. §101] proscription on injunctions against labor organizations in "labor disputes." The Taft-Hartley, or Labor-Management Relations Act [61 Stat. 136 (1947), 29 U.S.C. §141] established jurisdiction in the federal courts for the issuance of injunctions in a number of different cases. One case was to prevent certain payments by employers to employee representatives [§302(e), 29 U.S.C. §186(e)]; another was to enjoin certain national emergency strikes [§208, 29 U.S.C. §178]; and a third exception to Norris-LaGuardia was the injunction that could issue to provide preliminary relief while the Board was determining whether conduct against which charges had been filed was an unfair labor practice

[§§10(j), (l), 29 U.S.C. §§160(j), (l)].

In all of the other Acts of Congress which we have examined, the administrative agency which is given authority to seek injunctive relief has discretion as to whether or not to seek such relief. A list of such Acts is appended to this brief.

And in section 10(j) of the Labor-Management Relations Act, this same rule obtains, i.e., "the Board shall have power . . . to petition any district court . . . for appropriate temporary relief or restraining order . . ." [§10(j), 29 U.S.C. §160(j) (emphasis added)].

Section 10(l) (under which the petition in this case was filed) is significantly different. Alone among the Congressional enactments that we have examined, section 10(l) denies to the administrative agency any discretion when that agency has "reasonable cause to believe" that a charge that certain types of unfair labor practices are being committed is true. Under this section, such a finding on the part of the Regional Director constitutes a mandate from Congress to "petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter" [§10(l), 29 U.S.C. §160(l)].

The Regional Director is required under section 10(l) to seek an injunction. This section has been described by the Board's Chairman as "the mandatory injunction

provision. . . . In essence, it requires us to seek an injunction." Address by Chairman McCulloch, Joint Industrial Relations Conference of Michigan State University, April 19, 1962, in 49 L.R.R.M. 74, 81 (1962); accord, Comment, Temporary Injunctive Relief Under Section 10(l) of the Taft-Hartley Act, 111 U. Pa. L. Rev. 460, 463 (1963).

The basis for such a description is clear. Where Section 10(j) gives the Regional Director "power" to seek an injunction, section 10(l) states that the Regional Director "shall" seek injunctive relief if he has reasonable cause to believe that there has been a violation of sections 8(b)(4)(A), (B), or (C), or section 8(e) or 8(b)(7). Not only does this contrast in language exist between sections 10(j) and 10(l), but within section 10(l) itself there appears a distinction: The last sentence of this section gives the Regional Director discretion, "in situations where such relief is appropriate," to seek an injunction against a charged violation of section 8(b)(4)(D), while such discretion is lacking under the remaining provisions of section 10(l).

One further indicia of the lack of discretion on the part of the Regional Director when he has reasonable cause to believe that a charge alleging a violation of certain sections of the Act is true, is contained in the "Report on Administration of the Labor-Management Relations Act by the NLRB," which is found in the "Summary of Findings

and Conclusions of the Subcomm. on the NLRB of the House Comm. on Education and Labor," 87th Cong., 1st Sess. (1961) (Pucinski Report) [see 48 Lab. Rel. Rep. No. 45 (1961)]. In this Report, the subcommittee found "that the statutory provisions requiring, automatically," that an injunction be sought by the Regional Director, should be modified [id., at 3]:

> "The subcommittee, therefore, recommends that the statute be amended so as to give the Labor Board officials opportunity to exercise their discretion in whether or not to petition for the issuance of a court injunction" [ibid.].

See Comment, 111 U. Pa. L. Rev. 460, 465 n.22 (1963).

This Congressional subcommittee was under the impression--an impression justified by the language of the Act--that no discretion existed in the Regional Director, and that he is required under the circumstances present in this case to petition for the issuance of an injunction.

From all of these indicia, therefore, it is plain that once the Regional Director has reasonable cause to believe that a violation of section 8(e) has occurred as charged, he must seek injunctive relief.

B. The District Court Has Discretion to Grant or Withhold Relief.

That the Regional Director has no discretion, but must

seek injunctive relief if he has reasonable cause to believe that a charge alleging section 8(e) conduct is true, is manifest from the statutory scheme. The same lack of discretion, however, does not exist in the District Court, for under section 10(l), upon the filing of a petition by the Regional Director,

> "the district court shall have jurisdiction to grant such injunctive relief . . . as it deems just and proper . . ." (emphasis added).

The "it," of course, refers to the District Court, and "the courts have uniformly held that the granting of temporary relief is discretionary, although petitioning for it is not." Comment, 111 U. Pa. L. Rev. 460, 465 (1963).

In a somewhat analogous situation, presented in Frito Co. v. NLRB, 330 F.2d 458 (9th Cir. 1964), this Court commented upon the dichotomy of functions under the Labor Act, of some of the various agencies and tribunals. Charges were filed in Frito against a number of the Clerks' Unions which are involved in the present proceeding, 330 F.2d at 459 n.2, alleging that the contract between the Clerks and the Employers was violative of section 8(e) in that Article I, sections B, C(1), (2) and (3) was designed to cause the Employers to cease doing business with the driver-salesmen of market suppliers, 330 F.2d at 459-60. The Board's General Counsel issued a complaint in which he alleged that the violation of section 8(e) was accomplished

pursuant only to sections C(1) and (3). At the trial before the Board, the charging party offered evidence to the effect that the Act had been violated through the enforcement of some additional sections, sections B and C(2), as well as the Sections enumerated by the General Counsel. Both the Trial Examiner and the Board, however, found no violation of the Act on the basis of the contract sections that were attacked by the General Counsel, and both refused to rule on those contract clauses concerning which evidence was introduced by the charging party but which sections were not alleged to be unlawful in the General Counsel's complaint, 330 F.2d at 461.

This Court held in Frito that the Board had an obligation to examine and rule upon those sections of the contract concerning which evidence was introduced by the charging party without objection, and the Court's reasoning was contained in the following quotation:

> "It is now well settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board." 330 F.2d at 463-64.

Just as the General Counsel, once he made a decision to issue a complaint has "embarked upon the judicial

process" and may not thereafter direct the Board in its conduct of the litigation, so too when the Regional Director has filed a petition for injunctive relief--he too has then "embarked upon the judicial process," and the relief, if any, that shall be granted is in the control of the courts. The Regional Director's function is discharged when he makes a finding that there is reasonable cause to petition for injunctive relief.

C. A District Court's Refusal to Accept a Stipulation Rather Than Rule on the Regional Director's Petition, is Within the Court's Discretion.

Once issue has been joined in the federal courts, the parties are no longer at liberty to dispose of their case without leave of court, cf. Fed. R. Civ. P. 41(a)(2); Rollison v. Washington Nat. Ins. Co., 176 F.2d 364, 367 (4th Cir. 1949), and such leave may, in the discretion of the court, be denied or granted, see Diamond v. United States, 267 F.2d 23, 25 (5th Cir. 1959).

A case filed by the Board stands in no different posture in this regard, especially where Congress has directed that the Regional Director file the suit and that the District Court act on it. Indeed, it may well be nonfeasance on the part of the Regional Director should he fail, as required by section 10(l), to "petition . . . for appropriate injunctive relief pending the final adjudication

of the Board" (emphasis added).

While we can agree with the statement in the Board's brief that it is for the Regional Director and not the Court "to determine initially whether there is reasonable cause to believe the Act is being violated," at 17, it does not follow that once such a determination has been made by the Regional Director he may, in the case of a violation enjoinable under section 10(l) rather than 10(j), refuse to seek injunctive relief. Cf. Frito Co. v. NLRB, 330 F.2d 458 (9th Cir. 1964). The Board's argument that the District Court is required to accept a stipulation may have some merit were this a proceeding pursuant to section 10(j), for subsumed within the Regional Director's "power" under 10(j) to seek relief, is the power to change his mind and eschew this course of action.

If, however, under the non-discretionary terms of section 10(l), relief was requested by the Regional Director in order merely to comply with the requirements of the Act, only to have the request immediately withdrawn, this would be a clear circumvention of the Congressional dictate. In short, the Regional Director is not at liberty to determine for himself when he shall comply with the mandatory provisions of section 10(l) and when he shall not.

The Court's refusal to accept a stipulation is justified by the terms of section 10(l). The Regional Director's proffer of such a stipulation, on the other hand,

appears to be in derogation of that section.

It is argued that appended to the stipulation was a form of restraining order which could be entered without notice should the Regional Director become convinced that the Clerks and the Employers intended to continue violating the Act [Brief for Appellant Retail Clerks Locals 770, et al., at 22-23]. This argument lacks merit even apart from the question of whether the act of arbitrating was itself a violation of section 8(e).

Section 10(l) states that whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(e) and certain other sections, "the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character." And if the charge is believed to be true, injunctive relief must then be immediately sought. Congress has, in other words, decreed that there shall be neither delay nor discretion on the part of the Regional Director. It has made a legislative determination that injunctive relief shall immediately be sought, see Schauffler v. Local 1291, Int'l Longshoremen's Ass'n, 292 F.2d 182, 187 (3d Cir. 1961) ("The Section 10(l) procedure reflects the congressional determination that certain unfair labor practices are so disruptive that where there is reasonable cause to believe that they are being engaged in their continuance during the pendency of charges

before the Board should not be permitted."), and the question of whether such relief should "properly" issue is to be left to the District Courts.

There is simply no room within the statutory mandate, therefore, to argue that the Regional Director may have reasonable cause to believe a charged violation of section 8(e) is true, and at the same time may refuse to seek an injunction. If this is what the parties are arguing, it is plainly contrary to the statutory scheme.

D. A Charging Party May Properly Call Matters to a District Court's Attention Under Section 10(1), and the District Court May Properly Rule Upon Those Matters.

By stating that the Charging Parties caused the Court to violate the Norris-LaGuardia Act, the appellants seek to make an issue out of what in fact is a red herring.

We agree with the position that neither a charging party nor any other person (other than the Board), may sue for an injunction to prevent conduct which is arguably an unfair labor practice, see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); nor does a charging party or any other person have a right to intervene in a suit filed by the Board under section 10(1). The latter proposition follows from the fact that Congress has specifically delimited, in the second proviso to section 10(1), the status of a charging party as follows:

"Upon the filing of any such petition [for injunctive relief under section 10(l)] the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevent testimony" (emphasis added).

We also agree with the proposition that a charging party has no standing to seek a contempt citation against one who violates a section 10(l) injunction.

But having conceded all this, in light of the statutory status given the charging party it does not follow that the charging party must remain silent, or that any testimony introduced or arguments made may not be listened to or acted upon. The case of Phillips v. UMW. Dist. 19, 218 F. Supp. 103 (E.D. Tenn. 1963), upon which each of the appellants rely in their briefs, involved a motion by a charging party to intervene and to have the respondent held in contempt. In denying these motions, the court said:

"The denial of the right to intervene does not however mean that the charging party is wholly without right to be heard or that the Court will ipso facto disregard any and all legal contentions advanced by the charging party in this proceeding." 218 F. Supp. at 106.

The court then proceed to take up each of

the charging party's legal contentions and dispose of them on the merits, thereby sustantiating its statement that it would not refuse to consider matters merely because they had been advanced by the charging party rather than by the Board.

And the case of McLeod v. Business Mach. Mechanics, 300 F.2d 237 (2d Cir. 1962) does not detract from the proposition that within the limits of the petition filed by the Regional Director (or within the limits of the evidence presented to the District Court without objection, cf. Frito Co. v. NLRB, 330 F.2d 458, 464-65 [9th Cir. 1964]), the charging party may present views to the District Court which may be accepted by the court even though these views were not urged by the Regional Director. In McLeod v. Business Mach. Mechanics, supra, the charging party sought on appeal to broaden the issues beyond the points upon which the Regional Director relied in his petition and argument, 300 F.2d at 242, and the court held that it was without jurisdiction to consider the expanded issues, 300 F.2d at 242-43.

To the extent that a District Court enjoins acts other than those which were petitioned against or which were shown by unobjected-to evidence to be of a similar nature, the Business Mach. Mechanics case may have relevance; however, as shall be shown, the order in the present proceeding did not go beyond these limits and it was, therefore, within the District Court's power.

II.

UNDER THE FACTS OF THIS CASE, THERE WAS "REASONABLE CAUSE" TO BELIEVE THAT THE CLERKS' CONDUCT VIOLATED SECTION 8(e), AND THE DISTRICT COURT'S ORDER WAS "JUST AND PROPER."

In order to sustain an injunctive order under section 10(l), it is necessary that the Regional Director have "reasonable cause" to believe a charged violation of section 8(e) is true; and the order issued by the District Court must be "just and proper."[5/]

A. The Regional Director Had "Reasonable Cause" to Believe the Charged Violation of Section 8(e) Was True.

The petition filed by the Regional Director was verified. In the petition it was alleged that a prior proceeding under section 10(l) had been instituted against

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5/ The suggestion in the brief of Clerks Locals 324, et al., at 14, that this matter may be moot because there was present a different request for arbitration than the one which initiated the Regional Director's petition, is answered by Division 1287, Amalgamated Street Employees v. Missouri, 374 U.S. 74, 77-78, 10 L.Ed.2d 763, 765-66 (1963), and by the fact that both arbitration demands were essentially the same.

the Clerks [T.R. 15, ¶6], and had been dismissed upon the Clerks' stipulation to refrain from "maintaining, giving effect to or enforcing Article I" of their collective bargaining agreement with the Employers, so far as it required the Employers to cease doing business with other persons [T.R. 45, ¶2(a)].

In violation of their stipulation, the Clerks demanded arbitration of the portion of Article I that was in dispute [T.R. 16, ¶8]. The arbitration demand was addressed to the question of whether as a result of the Clerks' inability to enforce Article I, there had been a failure of consideration sufficient to require a renegotiation of the collective bargaining agreement, and whether the Clerks were free to strike the Employers because of the parties' inability to put Article I into effect (the latter point being underlined by the Clerks in their letter to the Employers in order that the significance of the strike threat not escape the Employers' attention) [T.R. 56-57].

Having alleged these facts, the Regional Director next alleged that "by the acts and conduct" of demanding arbitration of those issues, "respondent Local 770 [of the Clerks] has entered into, invoked and given effect to a contract or agreement" which violates section 8(e) [T.R. 16-17, ¶9].

Prior to the hearing in the District Court on the proposed stipulation to refrain from engaging in unfair

labor practices in the present case, the Charging Parties filed a written memorandum. They pointed out in this memorandum that the Regional Director had presented no affidavits or other evidence in support of his request to permit arbitration to proceed, "to show how conduct which is alleged in [the] Petition to be a violation of the Act . . . is now not regarded as wrongful" [T.R. 134]. At the hearing on May 10, 1965, it was again pointed out that the petition alleged that proceeding to arbitration was a violation of the Act [May 10 Trans. at 17, lines 15-18], and that the Regional Director had presented no evidence to the contrary [id., at 33, lines 7-18]. And in the District Court's memorandum opinion, filed on May 27, the Court told the Regional Director:

> "That effort at arbitration is alleged in the Petition to be a violation of the Act, and is specifically asked to be enjoined by Paragraph 1(a) of the prayer of the complaint in this court" [T.R. 168, lines 20-23].

In the face of these many statements by the Court and the Charging Parties that it was the Regional Director's own sworn petition which was being relied upon for the proposition that permitting arbitration to proceed would violate the Act, and notwithstanding that following these events a motion for reconsideration was filed by the Regional Director [T.R. 172], no effort was made to amend

the petition; no effort was made to introduce any evidence or show any facts to controvert the sworn statements in the petition; and more, the Regional Director at no time represented to the Court that such conduct would not violate the Act, but only that he had been given assurances that any arbitration award would not be put into effect until it had first been approved by him.

This constituted on the part of the Regional Director an admission that arbitration of the attacked clauses would violate the Act. The Regional Director chose to rest his case on the legal principal that the District Court was required, as a matter of law, to accept the proffered stipulation,[6/] and when this position was ruled upon adversely to the Regional Director he informed the Court that "the petition and the documents attached to the pleadings give reasonable cause for the Regional Director to believe that there has been a violation of the Act" [June 14 Trans. at 50, lines 7-11].

6/ When the Court denied the Regional Director's motion for reconsideration, a motion was made by the Regional Director to certify the matter to the Court of Appeals on the legal issue of the refusal to approve the stipulation [May 14 Trans. at 6, line 18 to p. 7, line 8], at which time the Court again pointed out that the petition itself alleged that the Clerks' conduct violated the Act [id., at 7, lines 9-17].

Apart from his legal position, therefore, that the stipulation should be approved and that it was error not to do so, the Regional Director acknowledged that he had reasonable cause to believe that the charge alleging a violation of section 8(e) was true, that proceeding to arbitration would violate the Act, and that the arbitration should be enjoined.

The Clerks similarly chose to rest their case without putting on any evidence. Their position must now be that as a matter of law the Regional Director did not have reasonable cause to believe that demanding and engaging in arbitration with respect to clauses that are violative of section 8(e), is itself a violation of section 8(e). This position is amply refuted in the points and authorities filed by the Regional Director in support of his application for an injunction [see T.R. 87-104]. Some of the cases cited by the Regional Director are the following: Hillbro Newspaper Printing Co., 135 N.L.R.B. 1132, enforced, Los Angeles Mailers Union V. NLRB, 311 F.2d 121 (D.C. Cir. 1962) (reaffirming hot cargo clause is "entering into" it); Kennedy v. Service Employees Union, Civil No. 63-490-JWC (S.D. Cal. 1963) (arbitrating is equivalent to giving effect to unlawful clause); McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964) (ibid.). We urge this Court to read the Regional Director's excellent points and authorities on this issue for a dispositive argument,

complete with quotations from the Act's legislative history, that demanding arbitration of the attacked clauses (especially, as here, under strike threats), is a violation of section 8(e) of the Act.

B. The District Court's Order Was "Just and Proper."

Under section 10(l), the District Court is given jurisdiction to issue such order as is "just and proper." The order in this case was such an order.

The District Court was aware when it issued its order that the Clerks had once before promised to refrain from engaging in unfair labor practices, but that they had violated this pledge. Although the Regional Director was willing to take the Clerks' word a second time, the fact of the Clerks' duplicity was before the Court and obviously convinced it that if given the opportunity, the Clerks would again violate a stipulation. Having arrived at such a conclusion, the Court was free to exercise the powers supplied to it by section 10(l) and issue an injunction

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rather than approve a stipulation.[7/]

The Clerks' demand for arbitration of the attacked clauses caused the Regional Director in his petition to claim a violation of the previous settlement agreement. The arbitration that was demanded was over grievances claimed to have arisen as a result of the unenforceability of the attacked clauses.

In other words, for not giving effect to the attacked clauses, and not refusing to deal with persons who were non-signatories to a Clerks' agreement, the price to be paid by the Employers was that they were to be subjected to an arbitration proceeding designed to void the entire contract and to release the Clerks' from their no-strike pledge.

This Court, in NLRB v. Amalgamated Lithographers, 309 F.2d 31 (9th Cir. 1963), held similar tactics to be violative of the Act. The lithographers in that case had a "trade shop" clause which was found to violate section 8(e), and although the employers were not required to live up to this clause, if they did not do so the lithographers

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7/ There are some matters, such as judging the veracity of witnesses, which do not require the Board's "expertise" and which courts are at least as capable of ruling on. Cf. NLRB v. Int'l Union of Operating Eng'rs, Local 12, 323 F.2d 545, 548 (9th Cir. 1963) (legal effect of contract is a matter of law, and court not bound by Board's construction).

were free to open the contract. Concluding that under this provision "the employer agrees that he will deal with non-union employers only at the risk of giving up all of his benefits under his contract," 309 F.2d at 36, the Court found this tactic to be unlawful. The Board too has dealt with such subterfuges and has uniformly condemned them. See, e.g., Arthur J. Galligan, 148 N.L.R.B. No. 31, 56 L.R.R.M. 1471, 1472, 1964 CCH NLRB ¶13,334 at pp. 21,295-96 (1964) (imposition of financial penalty on employer who purchases coal from non-union company). And in Brown Transport Corp., 140 N.L.R.B. 1436 (1963), set aside on other grounds 334 F.2d 539, 548-49 (D.C. Cir. 1964), the Board said of a "hazardous work clause" which permitted the contract to be reopened for additional benefits if the employees were required to handle "hot cargo,"

> "It is a method for making it difficult and expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle 'hot cargo' goods or equipment." 140 N.L.R.B. at 1439.

Both the Board and the Courts have seen through such devices. By demanding of the Employers an arbitration in which the Employers can gain nothing, but risk losing their entire contract and being subjected to a strike, the Clerks have advised the Employers that the only real alternative is to "voluntarily" give effect to the

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unlawful clauses.[8/] It is this conduct of which the District Court was aware and which it enjoined when it ordered the Clerks to refrain from arbitrating any matters in connection with the contested clauses.

That the seven points which the Clerks seek to arbitrate are but a ruse is evidenced by the uncontradicted evidence supplied by the head of one of the Clerks' unions. DeSilva, in his newspaper article, stated that any time the Employers wished to avoid the trouble and expense of arbitration, they could do so simply by "voluntarily" living up to the illegal clauses, see pp. 6-7, supra. These points were, in other words, "a strategem to enforce or maintain contractual provisions in a manner which makes the provisions unlawful under the Act" [Brief for Board at 18]. See McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1964), in which an arbitration proceeding was enjoined at the insistance of the

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8/ There is, of course, no unlawful conduct under the Act when, absent an agreement either "express or implied," §8(e), one employer ceases dealing with another employer at the urging of a union, see Local 20, Teamsters v. Morton, 377 U.S. 252, 259, 12 L.Ed.2d 280, 286 (1964). It is only when there is an agreement between the union and employer to that effect, or when the "urging" becomes a form of pressure, that the conduct is unlawful.

Board.[9/]

This evidence was before the District Court, as was the evidence that the Employers agreed to arbitrate only under a strike threat. The bona fides of the Clerks' arbitration demands were clearly in issue and the Court ruled, on the basis of the evidence before it, that the arbitration was but a sham which in truth was intended to compel compliance with the unlawful clauses. For this reason, the Court enjoined any arbitral proceedings arising out of these clauses.

Parenthetically, the original injunction order--drawn up by the Board and approved as to form by the Clerks--enjoined in paragraph (c) the carrying on of any arbitration under all of Article I of the Clerks' agreement [T.R. 204]. Objections to the breadth of the proposed order were filed by the Charging Parties [T.R. 195], and in the Court's nunc pro tunc order paragraph (c) was limited so that

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9/ Inasmuch as the arbitration itself constitutes an unfair labor practice and a violation of the Act, see McLeod v. American Fed'n of Television Artists, 234 F. Supp. 832 (S.D.N.Y. 1963), the Clerks' (Local 770, et al.) citation of Supreme Court cases which favor arbitration of issues that may be unfair labor practices, is inapposite to the question of whether the arbitration in this case should be permitted to proceed.

arbitrations could take place with respect to sections of Article I other than those in dispute [T.R. 199]. The Board's brief incorrectly chronologizes these events, and it appears that the writers thought there was first a limited order issued but that "at the request of the charging parties and over the Board's objection, the court amended the order nunc pro tunc to add paragraph (c) thereof which was not so limited" [Brief for Board at 18-19]. Presumably, now that the Board is apprised of which order is in effect, its objection to the present order's breadth will be withdrawn since its brief appears to say it was satisfied with the "original" order [id., at 18]. Moreover, the present injunction is quite like the one prayed for in the petition [T.R. 17-18, ¶1(a)].

CONCLUSION

The Charging Parties have, by statute, been given sufficient status in a section 10(l) proceeding to permit them to present facts and law to the District Court. The Charging Parties did not initiate any proceedings but were merely present to protect the interest that Congress gave to them. In protecting this interest, they were able to bring to the Court's attention certain matters which supported the position originally taken by the Regional Driector, which did not go beyond the issues framed by the Regional Director's petition, and which were of sufficient

moment to convince the Court that the Regional Director's prayer should be satisfied.

For this, the Charging Parties are described as having caused the Court to violate the Norris-LaGuardia Act. The same, however, could be said any time a charging party presents evidence upon which the District Court decides to act. Presumably, in giving charging parties status, Congress had in mind some reason other than merely to permit charging parties to parrot the Regional Director, else this would have been a useless act. The present case demonstrates the utility of permitting charging parties a voice.

In fulfilling the function prescribed for them by Congress, the Charging Parties were able to present to the District Court evidence demonstrating that the Clerks had previously been unfaithful to their promise, and that the proposed arbitration was merely one more in a series of tactical moves to secure "voluntary" compliance by the Employers with illegal contract clauses. Therefore, in addition to the arbitration being unlawful per se as an affirmation of illegal clauses, the Court was convinced that the Clerks had an unlawful and ulterior motive in attempting to compel the Employers to arbitrate.

For either or both of these reasons, the Court was correct in enjoining the arbitration, and the

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order should be affirmed.

Respectfully submitted,

BRUNDAGE & HACKLER
CHARLES K. HACKLER
JULIUS REICH

By _____
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Attorneys for Amicus Curiae
Joint Council of Teamsters No. 42

APPENDIX

This appendix lists all the Acts of Congress which we have been able to find, in which administrative agencies are authorized to seek injunctive relief in the district courts.

1. Agricultural Adjustment Administration Act, 7 U.S.C. §608a(7) (whenever the Secretary [of Agriculture] . . . has reason to believe that any handler has violated . . . any order . . . the Secretary shall have power to institute an investigation . . . for the purpose of referring the matter to the Attorney General for appropriate action")(emphasis added).
2. Atomic Energy Act, 42 U.S.C. §2280 ("[T]he Attorney General . . . may make application to the appropriate court . . .")(emphasis added).
3. Electric Utility Companies Act, 16 U.S.C. §825m(a) ("[The Federal Power Commission] may in its discretion bring an action in the proper District Court . . .")(emphasis added).
4. Emergency Price Control Act, as quoted in Hecht v. Bowles, 321 U.S. 321, 321-22, 88 L.Ed. 754, 756 (1954) ("[The Administrator of the Office of Price Administration] may make application to the appropriate court . . .")(emphasis added).

5. Fair Labor Standards Act, 29 U.S.C. §216(c) ("[T]he Secretary of Labor may bring an action in any court . . .")(emphasis added).

6. Federal Aviation Program Act, 49 U.S.C. §1487(a) ("[T]he [Civil Aeronautics] Board or Administrator [of the Federal Aviation Agency] . . . may apply to the district court . . .")(emphasis added).

7. Federal Trade Commission Act, 15 U.S.C. §53(a) ("[T]he [Federal Trade] Commission . . . may bring suit in a district court . . .")(emphasis added).

8. Holding Company Regulation Act, 15 U.S.C. §79r(f) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .")(emphasis added).

9. Interstate Commerce Act, 49 U.S.C. §16, par. (12) ("[T]he Interstate Commerce Commission or any party injured . . . or the United States . . . may apply to any district court . . .")(emphasis added).

10. Interstate Commerce Act, 49 U.S.C. §43 ("[A] petition may be presented [by the Interstate Commerce Commission] . . . to the district court . . .") (emphasis added).

11. Interstate Commerce Act, 49 U.S.C. §322(b) ("[T]he [Interstate Commerce] Commission . . . may apply to the district court . . .")(emphasis added).

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12. Interstate Securities Act, 15 U.S.C. §78u(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .") (emphasis added).

13. Investment Advisers Act, 15 U.S.C. §806-9(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .")(emphasis added).

14. Investment Companies Act, 15 U.S.C. §80a-41(e) ("[The Securities and Exchange Commission] may in its discretion bring an action in the proper district court . . .")(emphasis added).

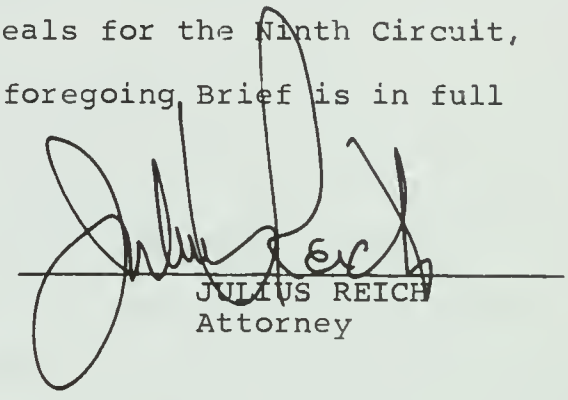
15. Labor-Management Relations Act, 29 U.S.C. §160(j) ("The [National Labor Relations] Board shall have the power . . . to petition any United States district court . . .")(emphasis added).

16. Labor-Management Relations Act, 29 U.S.C. §178(a) ("[T]he President [of the United States] may direct the Attorney General to petition any district court . . .")(emphasis added).

17. Securities Act of 1933, 15 U.S.C. §77t(b) ("[The Securities and Exchange Commission] may in its discretion, bring an action in any district court . . .")(emphasis added).

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Code of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.



JULIUS REICH
Attorney

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA]
] ss.
County of Los Angeles]

I, PATRICIA WIMBERLY, being first duly sworn, depose and say as follows:

I am a citizen of the United States and am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 1621 West Ninth Street, Los Angeles 90015, in said County and State; on the 19th day of August, 1965, I served the within BRIEF FOR AMICUS CURIAE JOINT COUNCIL OF TEAMSTERS NO. 42, on the Appellants, Appellee and Charging Parties in this action, by placing a true copy thereof in an envelope addressed to their attorneys of record, addressed as follows:

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and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail box regularly maintained by the Government of the United States at Ninth and Beacon Streets, in the City of Los Angeles, State of California.

I certify under penalty of perjury that the foregoing is true and correct.

Patricia Wimberly
PATRICIA WIMBERLY

SUBSCRIBED and SWORN to
before me this 19th day
of August, 1965.

A Notary Public in and
for said County and State

OFFICIAL SEAL
DOROTHY C. HARMS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

DOROTHY C. HARMS
My Commission Expires July 2, 1969